No. 10027.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Appellant,

vs.

ROSETTA ALICE KELLEY,

Appellee.

APPELLEE'S BRIEF.

SYLVESTER HOFFMANN,
215 West Fifth Street, Los Angeles,
Attorney for Appellee.

Parker & Baird Company, Law Printers, Los Angeles

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

Cases.

PAGE

PAGE

Rules.

Statutes.

Textbooks.

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Foreword.

The appellee earnestly contends that whether or not the appellant's affirmative defense of fraud was established by the required quantum of proof was wholly a question of fact which the jury resolved in favor of the beneficiary-plaintiff (appellee) and that as the appellant did not question the correctness of the charge as given to the jury by the learned trial judge, it is foreclosed now from maintaining that different rules of law are applicable; the instructions became "the law of the case." Therefore, while appellee has also endeavored to demonstrate in this brief that the "points" argued by appellant are not well taken, she does not thereby concede that any of them are now open to question, if included in the charge to the jury.

Emphasis and parenthetical words or remarks in this brief are supplied by the appellee, unless otherwise noted. All citations to the Federal Reporter are to decisions of a Circuit Court of Appeal, unless otherwise expressly noted.

I.

Summary of the Evidence.

Appellants' "Summary of the Evidence" quite properly follows the subhead "Argument," for it is neither accurate, fair, nor complete and entirely ignores the abecedarian rule that upon this appeal, this Court should view the evidence in the light most favorable to the appellee, including all inferences and presumptions deductible from the facts, so viewed, and all conflicts must be resolved in her favor. Appellant ignores *its* witness, Mr. Posey.

Appellant concedes that if it did not sustain the burden of proof on its affirmative defense, the judgment should be affirmed. Respondent's summary will be confined to that sole issue. It was admitted by the pleadings [R. 2 *et seq.*], or stipulated to at the trial [R. 29-31; 54-57] that all the facts alleged in plaintiff's complaint were true.

Thus, for example, there is and was no dispute that the defendant issued a $5000 endowment insurance policy to Kelley, effective March 1, 1932, wherein his wife, the plaintiff, was the beneficiary; that he paid $635.50 in premiums (none of which have been repaid, or tendered the beneficiary); that the policy was in force when he died, August 10, 1935; that a "disagreement" existed when the action was filed; and that plaintiff's cause of action was not barred by the lapse of time.

(1) The policy sued upon provided: "This policy shall be incontestable . . . except for fraud, non-payment

of premiums, or on the ground that the applicant was not a member of the military or naval forces of the U. S." [R. 43]. Rosetta Alice Kelley (plaintiff) was named the beneficiary [R. 33].

(2) The insured, Thomas J. Kelley, signed a written application for $5000 U. S. Government insurance, dated March 15, 1932, in which it is stated that he had not previously applied for a Government compensation, or pension [R. 58, Question 13].

(3) He made an application for "disability allowance" to the Veterans' Administration, dated August 31, 1931 [R. 75] and for compensation [R. 82].

(4) In his application for insurance, it is denied that he had any operations except for hemorrhoids [R. 59, Ques. 21]. There was no evidence showing or tending to show the contrary.

(5) He answered the question: "Are you in good health?" in the affirmative [R. 59, Ques. 25]. He was employed as a railroad fireman by the Union Pacific Railroad from 1921. He worked eight to sixteen hours a day until 1932, when he worked eight to twelve hours. He was never home sick until his last illness [R. 130-132], which commenced February, 1934: he died August 10, 1935 [R. 134]. Joseph E. Scott, a title examiner, saw him very frequently between February, 1923 and February, 1934: Kelley never complained and appeared in good health during said entire term [R. 155-156]. John F. Hosfield, secretary of the Elks' Lodge at San Bernardino, in which city Kelley lived, saw him two to four times a month over a term of seventeen years, and at all times Kelley appeared to be in good health [R. 157-158]. Nelson Woods, a locomotive engineer, who knew Kelley since 1924, and worked with him on the same engine from

1929 to February, 1934, testified that they both worked seven days a week, eight to nine hours a day; and that Kelley was a good worker, doing the work of two men (of both fireman and conductor), the work being strenuous [R. 158-161]. Joseph Gross, a conductor on the Santa Fe Railroad (which shared the use of its tracks with the Union Pacific) saw Kelley very often between 1929 and 1933 and knew Kelley for over ten years and Kelley appeared at all times to have been in good health [R. 161-163]. His wife never knew him to have consulted a physician, except for required periodic examinations by the "company doctor" [R. 132-133].

(6) He was examined by Walter Lenker, M. D., on March 15, 1932 (as part of the insurance application), who found Kelley in good health [R. 60]. Dr. Lenker had known Kelley for nine years previously [R. 60]. Dr. Lenker died before the time of the trial [R. 134]. Dr. Lenker was employed as the "company doctor" for the Union Pacific Railroad [R. 134] and had examined Kelley at two-year intervals [R. 133]. If Kelley had suffered from syphilis, rheumatism, or any other disease in the nine years prior to the examination in 1932, Dr. Lenker knew nothing thereof and found no evidence thereof [R. 60].

(7) In his insurance application Kelley denied that he had been *treated* for any of several named diseases, including diseases of the heart, genito-urinary organs or bones [R. 59, Ques. 26]. In Kelley's application for compensation [Deft's Ex. "F," R. 82] he stated that Dr. F. P. King, D. C., a *chiropractor,* had given him "spinal adjustments" [R. 84].

(8) He was examined by Dr. Louis J. Burstein, an employee of the defendant, in connection with his appli-

cation for disability allowance and compensation and *not* for the purposes of treatment; the doctor did not give Kelley any advice, and testified, further, that Veterans' Administration regulations prohibited its doctors from doing so, and from telling Kelley what, if any, disease, the examination might disclose Kelley was suffering from [R. 115-118].

Dr. Burstein testified that he saw and examined Kelley just once, and discovered certain diseases. His findings were in direct, violent conflict with those of Dr. Lenker, who had known Kelley for nine years and had examined him at regular two-year intervals. (See par. "6," above.)

(9) Kelley, in his insurance application answered, in the negative [QUES. 27]: "Have you been ill, or contracted any disease, or suffered any injury, or been prevented by reason of ill health from attending your usual occupation, or consulted a physician in regard to your health, since the date of discharge?" stating that he had an operation for hemorrhoids in 1920 [R. 59].

(10) After Kelley was examined by Dr. Burstein (upon his applications for compensation and pension) a letter was written to him [Ex. H, R. 128, 129] stating that his "disability, aortitis, chronic, *mild*" was *"less* than permanent partial 25%" and that it was not of "a degree of 10% or more." No other disease or disability is mentioned, nor is "aortitis" defined or given any common name readily comprehensive to a layman. There is no evidence that Kelley was ever informed of the existence of any disease or disability, except by this letter, if Kelley received it. There was no evidence that Kelley ever received it, nor that the letter was *not* returned to defendant, undelivered.

(11) Mr. Posey, produced by the defendant, in the stead of H. L. McCoy, its Director of Insurance, testified that when a claim of compensation or pension is filed, it is assigned a "C-number," and the Insurance Section (at the Central office) in Washington would receive information that such claim had been filed. Kelley's application for insurance produced by the defendant [Ex. A, R. 58, which is the same as Ex. No. 1, mentioned in Posey's deposition; see R. 196] had noted clearly on its face: "C 1783258; T-2015048; no K" [Your Honors' attention is called to the photographic reproduction of the exhibit, R. 58].

Posey further testified that the "C" number (showing the veteran *had* applied for compensation or pension) reach the Insurance Section; that there is a master index in Washington, showing the names of such veterans and their respective "C" numbers; that such information is supplied the Insurance Section "promptly" and that frequently that Section has copies of the reports of physical examinations made of such applicants and that it was "quite probable" that Kelley's report [Ex. G, R. 109-115] had been received by the Insurance Section and in its files before April 5, 1932, the date the insurance application was accepted by that Section [R. 214-221].

Posey also identified (C-1783258) as the claim number assigned to Kelley, before he applied for his insurance [R. 221; see, also, same "C" number on letter of November 17, 1931, Ex. H, R. 128].

Posey also stated that *before* an application for insurance could be accepted, it was necessary, under the law, to determine whether any "term" insurance had been previously in effect; that the Insurance Section looked up Kelley's record in its card index and determined he had

had such a "term" contract and noted its number on Kelley's application, viz: "T 2015048" [R. 225-226]. [Your Honors' attention is directed to the significant fact that the data giving the "T" number is written *below* Kelley's "C" number: Ex. A, R. 58].

Posey testified that the "T" number was ascertained and marked on the application of Kelley by the Insurance Section *before* the application was accepted [R. 226] and that "it shows right on here" [Ex. A, R. 58] that the Insurance Section *knew* Kelley had applied for compensation or pension *before* his application was accepted and *before* the insurance was issued [R. 226].

Posey further testified that if the facts found by Dr. Lenker were true [Ex. A, R. 60] that Kelley was in good health when he applied for the insurace [R. 227]. (Parenthetically, while Posey's complete deposition is set forth, R. 191-232, only parts are to be found in the original reporter's transcript, R. 90-107, for the reason that the court reporter only wrote down the parts objected to during the trial. Under the stipulation on file, R. 189-191, Your Honors may consider the entire Posey deposition except those portions withdrawn in open court during the trial or to which objections were sustained by the trial judge.)

Posey further testified [R. 226]:

> "Q. Before granting the insurance? A. We checked the fact that he was entitled to it.
>
> Q. And in checking that, it was the policy (of the Insurance Section) to look at the index card to determine whether he had previously had a term policy? A. Yes.
>
> Q. And this index card showed that he did previously have a term policy? A. He did.

Q. And what evidence is there on (his) application . . . of March, 1932 [Ex. A, R. 58] which indicates that? A. Well, on the first page of the application there is a notation 'T 2015048,' which is the term application number.

Q. *And the index card which shows that T number also shows his C number, does it not?* A. *Yes.*

Q. *Then someone must have looked at that card and determined that he had a C number* BEFORE *his application was approved?* A. . . . *It is on the application. It shows right here (indicating).*

Q. *And that must have been put there before the application was approved, under those circumstances.*

A. *I'd think it was."*

(12) Appellant concedes that "mere mention (by Kelley) of the application for compensation would have opened the door to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation, and this would have revealed not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive" (p. 12, its Brief).

(13) Dr. Chapman testified that the report of the physical examination made by Dr. Burstein showed that *if* Kelley had syphilis at the time (Oct. 28, 1931), it had "no effect, visible effect" [R. 143]. And that *if* Kelley was affected with syphilis at that time, it was in "a very mild degree" [R. 147]. He likewise testified that *assuming* that all of the medical findings in the examination of the insured by the Government [Ex. G, R. 109-115] were true, nevertheless the conditions so shown would not have had any effect on Kelley's ability to pursue his usual vocation [R. 141].

(14) Appellant conceded, at the trial, that the report of the Government's examination of the insured [Ex. G, R. 109-115] showed "that there were no disabilities found by the medical examiner at that time" [R. 140, 141, 142].

From evidence, the concessions made by appellant during trial, the law as given to the jury (without objection or exception), the presumptions and inferences, and the weight given by it to the conflicts, the jury could have further determined:

(A) That Kelley's *claims* in his applications for compensation and disability pension (as to having certain disabilities) were untrue, and that his answers in his application relating to his death, were true.

(B) That it did not believe all the Government's medical evidence, or any part thereof, and did believe the lay and medical evidence produced by the appellee-beneficiary, in conflict therewith.

(C) That the Insurance Section of the Veterans' Administration made an investigation *before* approving Kelley's application or issuing the policy, and determined that his answers to Question 13 (a) and (d) [R. 58] were untrue, in fact, and that the Government's doctors had discovered both the alleged "aortitis" and syphilis, and waived the misrepresentations and the disabilities; that the Government did not therefore rely on the application; and that the Government relied on the findings of Dr. Lenker, the examining physician, which were true and correct.

(D) That Kelley never consulted a physician, since his discharge; that he never had been "ill" nor did he ever suffer from any "disease"; that if he had syphilis, he

didn't know it and had no reason to believe that he was suffering from any "illness" or "disease" when he made out his application.

(E) That Kelley's answers in his insurance application were true; or, if all were not literally true (in addition to the want or reliance and waiver, in Par. "C"), they were made in good faith, in the honest belief that they were true; that Kelley was not guilty of any fraud; and that his transactions as to the insurance were fair and regular.

(F) That the appellant had not presented the quantum of evidence required of it in sustaining each and every of the necessary elements of its affirmative defense (fraud).

(G) That Kelley had never been "treated" for any of the specific diseases enumerated in Ques. 26 (there was no evidence he had been), and that his answer to Ques. 25 was true [R. 59].

(H) That all of Ques. 26 [R. 59] should be reasonably interpreted to be read with and that Kelley honestly and justifiably read it in relation with the words, "been prevented by reason of ill health from attending your usual occupation," and that he was required, by Ques. 27, to report only if he had been "ill" or "contracted any disease," in the light of the words "been prevented . . . from attending your usual occupation," and that similarly, he had a right to interpret that complex question (Q. 27) in the light of the words "in regard to your health," and that he did so interpret said question, in good faith, and that his answers were not false or fraudulent. That the jury also determined that Q. 27 was ambiguous.

(I) That the physical examination made by the Government [R. 109-115] did not constitute either "consulting" a physician or being "treated" under either Ques. 26

or Ques. 27 [R. 59], and did not constitute treatment or consultation "in regrad to your (his) health."

(J) That a chiropractor was not understood by Kelley to be included in the term "physician," and that he had neither been "treated" by nor did he "consult" with "F. P. King, D. C."

(K) That in light of the medical and lay testimony in his favor, that Kelley did believe and he was justified in believing he was in good health, and not suffering from any "illness" or "disease."

(L) That from the letter from the Government, rejecting his claims for both compensation and disability pension [Ex. H, R. 128-129], he had a right to believe and did honestly believe that the only disability there reported, "aortitis, mild," viewed in connection with the references to "less than 25%" and "not of a degree of 10% or more," was inconsequential, or of little import, and was in fact either 0% or 1%, and hence was justified in not reporting the same, and was not guilty of fraud in not reporting it.

(M) That the presumption of innocence overcame the presumption that he received the letter [Ex. H, R. 128-129], and that he never did receive it.

Appellee submits that there were further findings of fact, and inferences and presumptions, which the jury (and the jury alone) had the right to make or draw from the evidence, and in view of the conflicts, the law of the case, and the law hereinafter set forth, together with the concessions of the appellant, made on this appeal, and its admissions made during the trial, that the general verdict of the jury, and the refusal of the trial judge to disturb it, should stand.

II.

The Law Contained in the Charge to the Jury Became the "Law of the Case."

Instructions, not excepted to by either party [R. 164, 188], became "the law of the case" and in determining whether the evidence was sufficient to sustain a verdict, its sufficiency should be tested by the law as announced in the instructions.

> *U. S. v. Atkinson* (1936), 297 U. S. 157, 159, 56 S. Ct. 391, 392;

This was a Government insurance case wherein the trial judge erroneously instructed the jury on a question of law; the Government failed to question the correctness of the instructions, either by exception or request to charge, and its motion for a directed verdict was upon other grounds. [See R. 164, for grounds of motion for directed verdict, *re: U. S. v. Kelley.*]

In affirming judgment for plaintiff, the Supreme Court held that the verdict of a jury will not be set aside for error not brought to the attention of the trial court, saying:

> "This practice is founded upon considerations of fairness to the Court and to the parties and of the public interest in bringing litigation to an end, after fair opportunity has been afforded to present all issues of law and fact."
>
> *Pacific States etc. Co. v. White* (1935), 296 U. S. 176, 56 S. Ct. 159;
>
> *National Surety Corp. v. City of Excelsior Springs* (1941), 123 F. 2d 573, 577;

MacDonald v. Schenkel (1941), 125 F. 2d 737;

Standard Oil Co. v. Burleson (1941), 117 F. 2d 412, 414;

Aetna Life Ins. Co. v. McAdoo (1940), 115 F. 2d 369;

Kurn v. Stanfield (1940), 111 F. 2d 469;

Guardian Life Ins. Co. v. Kissner (1940), 111 F. 2d 532;

F. W. Woolworth Co. v. Carriker (1939), 107 F. 2d 689;

Grant Storage Battery Co. v. DeLay (1937), 87 F. 2d 726;

Travelers' Ins. Co. v. Schenkel (1929), 35 F. 2d 611;

Ocean Acc. etc. Corp. v. Moore (1936), 85 F. 2d 369, *cert. den.* 299 U. S. 609, 57 S. Ct. 238;

U. S. v. Hossman (1936), 84 F. 2d 808, 810;

N. Y. Life Ins. Co. v. Stone (1935), 80 F. 2d 614;

Taylor v. U. S. (1934), 71 F. 2d 76, 77;

U. S. v. Nickle (1934), 70 F. 2d 871;

Garrett Const. Co. v. Aldridge (1934), 73 F. 2d 814;

Paf Mft. Co. v. Polk (1934), 72 F. 2d 33;

Fricke v. Gen'l Acc. etc. Co. (1932), 59 F. 2d 563;

Aetna Cas. etc. Co. v. Reliable (1932), 58 F. 2d 100;

Skaggs Safeway Stores v. Dunkle (1931), 49 F. 2d 169, *cert. den.* 284 U. S. 622, 52 S. Ct. 9;

Fidelity & Cas. Co. v. Niemann (1931), 47 F. 2d 1056, 1060;

Hard & Rand v. Biston (1930), 41 F. 2d 625;

Yelloway v. Hawkins (1930), 38 F. 2d 731;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176, *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

Fuller v. Schuh-Mason Co. (1925), 6 F. 2d 531;

Gregg v. Sayre (1834), 33 U. S. 244.

This Court has stated that the instructions of the trial court determine the theory upon which the trial was had and that "this theory of the case, accepted by both parties at the trial, cannot be questioned for the first time on appeal."

Reidy v. Myntti (1940, *CCA-9*), 116 Fed. 725, 729;

U. S. v. Aspinwall (*CCA-9*), 96 F. 2d 867;

Alverson v. Oregon-Wash. R. Co. (1916, *CCA-9*), 236 Fed. 331;

Boland v. Great No. Ry. Co. (1913, *CCA-9*), 202 Fed. 485.

It is to be assumed that the jury followed the Court's instructions.

Husky Ref. Co. v. Barnes (1941, *CCA-9*), 119 F. 2d 715, 717, 134 A. L. R. 1221.

It is appellee's further position that as all questions of fact were submitted to the jury under instructions as to which there was neither objection nor exception, "the verdict of the jury closes the question."

McDonald v. Schenkel (1941), 125 F. 2d 737;

U. S. v. Atkinson (1936), 297 U. S. 157, 56 S. Ct. 391;

Travelers' Ins. Co. v. Schenkel (1929), 35 F. 2d 611;

Julian Pet. Corp. v. Courtney (1927, *CCA-9*), 22 F. 2d 360.

Appellant "excepted" to *one* instruction as to attorney's fee, without stating the ground therefor [R. 188]; nor has appellant cited the same or any other alleged error of law in its specification of errors [R. 165-166] nor in its brief. The error, *if* any, was waived.

So. Pac. Co. v. Schwartz (1937, *CCA-9*), 89 F. 2d 192;

Rule 51, Rules of Civil Procedure;

O'Brien, "Manual Fed. App. Proc.," 3d Ed. (1941) p. 7, n. 1 (citing *9th Cir.*); pp. 126, 127; p. 127, n. 4; p. 211, n. 16, 17;

Rule 20, sub. "d", CCA, 9th Circuit; 136 A. L. R. p. 800, *note* (citing *9th Cir.*);

Liquid Veneer Corp. v. Smuckler (1937, *CCA-9*), 90 F. 2d 196 (Supreme Ct. Rule 8, strictly construed).

III.

The Motion for a Directed Verdict Was Properly Denied.

"The test as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested, is so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party."

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct. 637, 638 (citing and discussing Rule 50, "b", RCP);

U. S. v. Bemis (1939, *CCA-9*), 107 F. 2d 894, 897;

Paul v. Elliot (1939, *CCA-9*), 107 F. 2d 872;

Wood Lbr. Co. v. Andersen (1936, *CCA-9*), 81 F. 2d 161, 166, *cert. den.* 297 U. S. 723, 56 S. Ct. 669;

LaMarche v. U. S. (1928, *CCA-9*), 28 F. 2d 828: (*Held:* contradictory statements made by insured created a conflict for jury; judgment on directed verdict, *reversed*);

O'Brien, "Manual of Fed. App. Proc.," 3d Ed. (1941), p. 15, notes 17 and 20, and cases cited, therein, which are not repeated, above.

"It is not without significance on the appeal that the judge, who heard the testimony and was in a position to observe the demeanor of the witnesses, not only declined to direct a verdict [R. 164], but denied as well a motion for a new trial" [R. 23].

Phoenix etc. Express v. Mendez (1939, *CCA-9*), 103 F. 2d 66, 69, *cert. den.* 308 U. S. 566, 60 S. Ct. 79;

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct. 637;

Chrisite v. Callahan, 124 F. 2d 825, 827;

U. S. v. Barnette (1937), 91 F. 2d 10, 11.

IV.

It Is the Function of the Jury and Not the Circuit Court of Appeals, to Weigh the Evidence.

A few of its many decisions in point, selected at random, are:

U. S. v. Holland (1940, *CCA-9*), 111 F. 2d 949: (*Held:* immaterial that this Court might be of the opinion that the evidence preponderated in favor of appellant);

Liquid Veneer Corp. v. Smuckler (1937, *CCA-9*), 90 F. 2d 196, 205: ("Verdict should not be set aside if it can be sustained from *any* viewpoint);

U. S. v. Todd (1934, *CCA-9*), 70 F. 2d 540;

Phoenix Ins. Co. v. Bakovic (1924, *CCA-9*), 2 F. 2d 857.

V.

Only Evidence Favorable to Appellee Should Be Considered.

In determining whether the general verdict of the jury is supported by substantial evidence, all conflicts must be resolved in favor of the appellee, and the evidence should be viewed in the light most favorable to her, including all inferences and presumptions deducible from the facts so viewed.

Lumbra v. U. S., 54 S. Ct. 272, 290 U. S. 551;

Story Parchment Co. v. Patterson (1931), 282 U. S. 555, 51 S. Ct. 248;

Gunning v. Cooley (1930), 281 U. S. 90, 50 S. Ct. 231; (cited by appellant, p. 10, its Brief);

Copp v. Van Hise (1941, *CCA-9*), 119 F. 2d 691, 695;

U. S. v. Smith (1941, *CCA-9*), 117 F. 2d 911;

U. S. v. Holland (1940, *CCA-9*), 111 F. 2d 949;

Maryland Casualty Co. v. Stark (1940, *CCA-9*), 109 F. 2d 212;

U. S. v. Aspinwall (*CCA-9*), 96 F. 2d 867;

U. S. v. Meakins (*CCA-9*), 96 F. 2d 751, 756;

U. S. v. Hartley (*CCA-9*), 99 F. 2d 923;

U. S. v. Pritchard, 95 F. 2d 619 (inconsistent statements go to weigh and credibility for jury's consideration);

U. S. v. Klever (*CCA-9*), 93 F. 2d 15;

Bailey v. U. S., 92 F. 2d 456: ("It was for the jury . . . to say which statements were true and which were false, which were innocently and which were fraudulently made.");

U. S. v. Bodge, 85 F. 2d 433 (conflicts between statements by insured in application for insurance and his testimony at trial);

U. S. v. Todd (*CCA-9*), 70 F. 2d 540;

U. S. v. Alger (*CCA-9*), 68 F. 2d 592;

Fidelity & Cas. Co. v. Griner (1930, *CCA-9*), 44 F. 2d 706, 707;

Ford Motor Co. v. Pearson (1930, *CCA-9*), 40 F. 2d 858;

U. S. v. Robbins (1941), 117 F. 2d 145: (defense fraud);

Jones v. U. S. (1940), 112 F. 2d 282: (fraud defense);

Drew v. U. S., 104 F. 2d 939.

After verdict, all evidence and inferences properly deducible therefrom, tending to support the verdict, must be indulged by the Appellate Court.

U. S. v. Holland (1940, *CCA-9*), 111 F. 2d 949 (*Held:* what Your Honors' verdict would have been as jurymen is not to be considered);

U. S. v. Dudley (*CCA-9*), 64 F. 2d 743;

O'Brien, "Manual of Fed. App. Proc.," 3d Ed. (1941), p. 15, note 18 (citing *9th Cir.*).

It is "Hornbook law" that the "burden of proof" doesn't shift, on an appeal, and that it was not necessary for appellee, before the trial court, to *disprove* appellant's affirmative defense, of fraud. Appellant *stipulated* that plaintiff-appellee had made out a *prima facie* case, and that judgment should go to her UNLESS it sustained it's burden of proof.

And *even if* the "substantial evidence" test is to be applied to appellee's evidence (including presumptions and inferences in her favor), in relation to appellant's affirmative defense of fraud, then it is settled law that the phrase "substantial evidence" means more than a "scintilla" and *less* than "the weight of the evidence", and refers to the ultimate facts, as contra-distinguished from so-called primary facts. "Primary facts" are matters which can be readily established by direct testimony; whereas the "ultimate facts" are those which must be arrived at by a process of inferences from the primary facts, and applicable presumptions. Appellant, in its brief, *incorrectly* takes the position that the burden was on the appellee to *disprove* its affirmative defense, and not on it to sustain it by "clear, cogent, convincing and satisfactory proof" [R. 181].

N. L. R. B. v. Hudson Motor Car Co. (June, 1942), 128 F. 2d 528, 532;

Fidelity & Cas. Co. v. Martin (1933, *CCA-9*), 66 F. 2d 438.

In other portions of this Brief, appellee discusses and gives citations to the various circumstances wherein a *jury* question is presented—where the determination is one of *fact,* even where the evidence is uncontradicted—and the effect of inferences and presumptions, in support of the verdict.

VI.

An Inference Is a Permissible Deduction Which the Jury Is Entitled to Draw From the Evidence.

It has no legal probative effect *other than* the *jury* is pleased to attribute to it in a given case [R. 179-180].

Puget Sound Elec. Co. v. Benson (1918, *CCA-9*), 253 Fed. 710, 714.

The function of drawing inferences from the evidence is reserved wholly to the *jury*.

LaGuerre v. Brasileiro (1942), 124 F. 2d 553;
Halliday v. U. S. (1942), ... U. S. ....., 62 S. Ct. 438.

The function of *weighing* conflicts between inferences and other evidence, is that of the *jury* [R. 181].

Hayden v. U. S. (1930, *CCA-9*), 41 F. 2d 614;
Berry v. U. S. (1941), 312 U. S. 450, 615 S. Ct. 637;
Puget Sound Elec. Co. v. Benson (1918, *CCA-9*), 253 Fed. 710, 714;
Copp v. Van Hise (1941, *CCA-9*), 119 F. 2d 691, 695.

Even where evidence is undisputed, if different inferences may reasonably be drawn from it, it is for the jury to say what inferences shall be drawn, and they may be guided to their conclusion by the rule as to the burden of proof, which appellant concedes was on it.

Ft. Dodge Hotel Co. v. Bartelt (1941), 119 F. 2d 253, 259;
Puget Sound Elec. Co. v. Benson (1918, *CCA-9*), 253 Fed. 710, 714.

Where facts give equal support to each of two inconsistent inferences, judgment must go against the party on whom rests the burden of sustaining one of such inferences against the other [R. 181].

Ft. Smith Gas Co. v. Cloud (1935), 75 F. 2d 413;

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311; cited by appellant, p. 13, its Brief).

VII.

In Determining the Sufficiency of the Evidence, to Support the Verdict, That of the Appellee May Be Aided by Presumptions.

Collins v. Streitz (1938, *CCA-9*), 95 F. 2d 430, *cert. den.* 305 U. S. 608;

Conn. etc. Ins. Co. v. Maher (1934, *CCA*-9), 70 F. 2d 441, *cert. den.* 293 U. S. 591, 55 S. Ct. 106;

Puget Sound P. & L. Co. v. Seattle (1928, *CCA-9*), 29 F. 2d 254.

In the absence of sufficient satisfactory proof to *overcome* it, the jury should find according to a rebuttable presumption [R. 175, 179, 181, 182].

Bernstein v. Laughran (1938, *CCA-9*), 96 F. 2d 616, *cert. den.* 305 U. S. 629;

Puget Sound P. & L. Co. v. Seattle (1928, *CCA-9*), 29 F. 2d 254: (This court held that the presumption of fair dealing outweighs any conjecture leading to an opposite conclusion);

Easton v. Brant (1927, *CCA-9*), 19 F. 2d 857, 859: (It is a "well-settled principle of law" that if there is a failure to overcome a presumption

by testimony "convincing beyond reasonable controversy," the presumption will prevail);

Puget Sound Elec. Co. v. Benson (1918, *CCA-9*), 253 Fed. 710, 714.

The processes of probable reasoning in drawing a presumption and in weighing the evidence to overthrow it, are matters for the *jury* [R. 181, 182].

Conn. etc. Ins. Co. v. Maher (1934, *CCA-9*), 70 F. 2d 441, *cert. den.* 293 U. S. 591, 55 S. Ct. 106;

Metropolitan Life Ins. Co. v. Broyer (1927, *CCA-9*), 20 F. 2d 818;

Meoteris v. U. S. (1939), 108 F. 2d 402, 404;

Gilmore v. U. S. (1938), 93 F. 2d 774, 776, *cert. den.* 304 U. S. 567;

Penn. Mut. L. Ins. Co. v. Tilton (1936), 84 F. 2d 10.

VIII.

This Court Has Recognized Statutory Presumptions.

N. Y. Life Ins. Co. v. Gamer (1939, *CCA-9*), 106 F. 2d 375;

Bernstein v. Laughran (1938, *CCA-9*), 96 F. 2d 616, *cert. den.* 305 U. S. 629 (where this court applied the California disputable presumptions);

Sacramento Suburban etc. Co. v. Nelson (1930, *CCA-9*), 36 F. 2d 929;

Northwestern v. Higgins (1926, *CCA-9*), 15 F. 2d 646, *cert. den.* 273 U. S. 746, 47 S. Ct. 448;

Jenkins v. Anaheim (*CCA-9*), 247 Fed. 958, 961.

The District Judge charged the jury, without objection:

1. A presumption is evidence . . . and disappears only if the defendant produces sufficient evidence to preponderate against it [R. 182].

2. It is presumed that insured was innocent of crime or wrongdoing: that his transactions were fair and regular; that the answers made in his application were true and correct [R. 181, 192].

3. If evidence containing inconsistencies and incongruities is reconcilable, the presumption of innocence and fair dealing will impute the variance to misconception or mistake, rather than to a wilful and corrupt misrepresentation [R. 181].

4. Fraud is never presumed and the burden was of appellant to overcome the presumptions of innocence, truth and fair-dealing by clear, cogent, convincing and satisfactory proof [R. 181].

As elsewhere pointed out, these propositions of law became "the law of the case." (II, this Brief.)

All evidence which is admissible under the rules of evidence in the courts of general jurisdiction of California, was admissible in this action.

Rule 43(a), Federal Rules of Civ. Proc.

The rule is firmly established in *this* state that a presumption is *evidence*. It may outweigh other evidence adduced against it, and even as against an admitted or

proved fact, it remains with the jury to say whether or not that fact has been proven; and if the jury is not satisfied with the proof offered, it is at liberty to accept the proof of the presumption [R. 181, 182].

In this state, a presumption is not dispelled by evidence produced by the opposite party, but *remains as evidence* of a character sufficient to support a judgment.

Speck v. Saver (1942), 16 Adv. Cal. 615, 128 P. 2d 16. rehearing denied by Calif. Supreme Court Aug. 20, 1942;

Westberg v. Willde (1939), 14 Cal. 2d 360, 94 P. 2d 590;

England v. Auburn Auto Sales Corp., 11 Cal. 2d 64, 70, 77 P. 2d 1059, 1063;

Smellie v. So. Pac. Co., 212 Cal. 540, 299 Pac. 529, 532;

Woodward v. So. Pac. Co. (1939), 35 Cal. App. 2d 130, 94 P. 2d 1028, *cert. den.* 309 U. S. 670, 60 S. Ct. 614;

Sec. 1959, Calif. Code Civ. Proc.: "A presumption is a deduction which the law expressly directs to be made from particular facts."

Sec. 1961, Ibid.: "A presumption (unless declared by law to be conclusive) may be controverted by *other evidence* . . ."

Sec. 1963, Ibid.: (listing as *some* of the disputable presumptions):

1. That a person is innocent of crime or wrong;

19. That private transactions have been fair and regular;

33. That the law has been obeyed.

IX.

The Appellant Had the Burden of Proof and Did Not Sustain It Where the Evidence Leaves the Ultimate Fact to Be Proved, Conjectural, or Where the Proven Facts Give Equal Support to Each of Two Inconsistent Inferences [R. 178, 181].

Penna. R. R. v. Chamberlain, 288 U. S. 364 (cited by appellant, p. 10, its Brief);

Stevens v. White City (1932), 285 U. S. 195, 52 S. Ct. 347;

Gunning v. Cooley, 281 U. S. 90, 50 S. Ct. 231 (cited by apellant with approval, p. 10, its Brief);

U. S. v. Holland (1940, *CCA-9*), 111 F. 2d 949: ("If the evidence leads as reasonably to one hypothesis as to another, it tends to establish neither");

Adair v. Reorganization Inv. Co. (1942), 125 F. 2d 901, 905;

Thomson v. Stevens (1939), 106 F. 2d 739, 742.

This Court has held that the presumption of fair dealing outweighs any conjecture leading to an opposite conclusion [R. 181].

Puget Sound P. & L. Co. v. Seattle (1928, *CCA-9*), 29 F. 2d 254;

Sac. Suburban etc. Co. v. Nelson (1930, *CCA-9*), 36 F. 2d 929.

X.

Whether or Not Kelley Was Guilty of Fraud Was a Question of Fact for the Jury.

Gregg v. Sayre (1834), 33 U. S. 244;

Smith v. Vodges (1875), 92 U. S. 183;

St. Paul Ins. Co. v. Balfour (1909, *CCA-9*), 168 Fed. 212;

American Ins. Co. v. Vann (1941), 118 F. 2d 1004;

U. S. v. Robins (1941), 117 F. 2d 145;

Bailey v. U. S. (1937), 92 F. 2d 456;

Fidelity & Cas. Co. v. Genova (1937), 90 F. 2d 874: ("The issue of fraud was fairly submitted to the jury and its finding thereon is conclusive");

Metropolitan Life Ins. Co. v. Stringer (1928), 28 F. 2d 665.

XI.

Fraud, When Urged as an Affirmative Defense, Must Be Established by Clear, Cogent, Convincing and Satisfactory Proof [R. 181]. Such Burden of Proof Was on Appellant [R.174-175].

Ocean Acc. etc. Co. v. Rubin (1934, *CCA-9*), 73 F. 2d 157;

Northwestern Life v. Wiggins (1926, *CCA-9*), 15 F. 2d 646, *cert. den.* 273 U. S. 746, 47 S. Ct. 448: ("clear, cogent, convincing, and certain proof");

So. Development Co. v. Silva (1888), 125 U. S. 247, 250: ("clear and decisive proof": cited with approval by *appellant,* p. 9 of its Brief);

Smith v. Vodges (1875), 92 U. S. 183;

American Ins. Co. v. Vann (1941), 118 F. 2d 1004;

Kuhn v. Chesapeake (1941), 118 F. 2d 400, 405;

Jones v. U. S. (1940), 112 F. 2d 282, 287;

Marshall v. Gelfano (1938), 99 F. 2d 85 ("unequivocal and convincing");

New York Life Ins. Co. v. Bacalis (1938), 94 F. 2d 200: (citing *Northwestern v. Wiggins, 9th Cir.,* 15 F. 2d 646);

Fidelity & Casualty Co. v. Genova (1937), 90 F. 2d 874;

Griffiths v. Commissioner (1931), 50 F. 2d 782, 786: ("clear and convincing evidence");

Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.* 284 U. S. 621, 52 S. Ct. 9;

Jemison v. Commissioner (1930), 45 F. 2d 4, 5, 6;

XII.

Fraud Is Never Presumed [R. 181, 182].

Gregg v. Sayre (1834), 33 U. S. 244;

Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.* 284 U. S. 621, 52 S. Ct. 9;

Bernstein v. Langharn (1938, *CCA-9*), 96 F. 2d 616, *cert. den.* 305 U. S. 629, 59 S. Ct. 93;

Zell v. Bankers' Utilities Co. (1935, *CCA-9*), 77 F. 2d 22, 27;

May Hosiery Mills v. U. S. Dist. Ct. (1933, *CCA-9*), 64 F. 2d 450;

Sac. Suburban Fruit Lands Co. v. Nelson (1930, *CCA-9*), 36 F. 2d 929;

Gung You v. Nagle (1929, *CCA-9*), 34 F. 2d 848;

Sec. 1963, subs. 1, 19, 33, Calif. Code Civ. Proc.

XIII.

The Statements in the Application Were Representations and Not Warranties [R. 183].

Northwestern Mutual Life Ins. Co. v. Wiggins (1926, *CCA-9*), 15F. 2d 646, cert. den. 273 U. S. 746, 47 S. Ct. 448;

U. S. v. Depew, 100 F. 2d 725;

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347;

Chicago etc. Ry. v. Divine (1930), 39 F. 2d 537;

Bankers' Reserve Life Ins. Co. v. Matthews (1930), 39 F. 2d 528.

XIV.

Terminology of Application to Be Construed in Favor of the Insured.

Where, as here, the application form [R. 58-60] is prepared by the insurer, the meaning of words or phrases must be liberally construed and interpreted in favor of the insured and strictly construed against the insurer; and this rule applies to the answers given by the insured.

Stipcich v. Metropolitan Life Ins. Co., 277 U. S. 311 (cited by appellant, p. 13, its Brief);

Bankers' Life Ins. Co. v. Hollister (1929, *CCA-9*), 33 F. 2d 72;

Mutual Reserve L. Ins. Co. v. Dobler (*CCA-9*), 137 Fed. 550;

American etc. Co. v. Apt. (1934), 74 F. 2d 345, 348;

Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.* 284 U. S. 621, 52 S. Ct. 9;

The incontestability clause should be liberally construed in favor of the insured veteran and his beneficiary.

U. S. v. Patryas (1938), 303 U. S. 341, 58 S. Ct. 551;

Aschenbrenner v. U. S. F. & G. Co. (1934, certiorari to *CCCA-9*), 292 U. S. 80;

Mutual Life Ins. Co. v. Hurni (1923), 263 U. S. 167, 44 S. Ct. 90, 31 A. L. R. 102.

The terms "good health," "ill," and "disease," in an application for insurance, must not be considered in the light of scientific, technical definitions, but in the light of the insured's understanding of the terms.

Mutual Life Ins. Co. v. Frey (1934, *CCA-9*), 71 F. 2d 259.

See I, this Brief ("Summary of the Evidence"), subs. "H", "D", "G", "I", "J".

XV.

A Misrepresentation, Made Without Knowledge of Its Falsity, Is Not "Fraud."

A representation is not fraudulent unless made with *knowledge* of its falsity [R. 182, 184].

Appellant's Brief, p. 9, note 2.

Whether or not any statement made by Kelley *was* false or whether, the jury having found it to be untrue, Kelley *knew* that his answer in his *insurance* application was false, was solely for the determination by the *jury*,

as a question of fact. The burden of proof was on the defendant.

Moulor v. Amer. Life Ins. Co., 111 U. S. 335, 4 S. Ct. 466, 469;

Northwestern Mut. Life Ins. Co. v. Cohn (1939, *CCA-9*), 102 F. 2d 74 at 77;

Prudential Ins. Co. v. Winn (*CCA-9*), 71 F. 2d 126;

Northern Life Ins. Co. v. King (*CCA-9*), 53 F. 2d 613, *cert. den.* 385 U. S. 944, 52 S. Ct. 394;

Northwestern Mut. L. Ins. Co. v. Wiggins (1926, *CCA-9*), 15 F. 2d 646, *cert. den.* 273 U. S. 746, 47 S. Ct. 448;

U. S. v. Robins (1942), 117 F. 2d 145 (syphilis);

Jones v. U. S. (1940), 112 F. 2d 282;

Pilot Life Ins. Co. v. Dickinson (1938), 93 F. 2d 765, 766, 767;

Bailey v. U. S. (1937), 92 F. 2d 456;

Jeffress v. N. Y. Life Ins. Co. (1935), 74 F. 2d 874;

Wharton v. Aetna (1931), 48 F. 2d 37, *cert. den.* 284 U. S. 621, 52 S. Ct. 9;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176, *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

Mays v. New Amsterdam Cas. Co. (1913), 40 App. D. C. 249, *cert. den.* 238 U. S. 624, 35 S. Ct. 662;

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665.

The law raises no presumption of knowledge of falsity from the fact, *per se,* that the representation was false.

Southern Dev. Co. v. Silva (1888), 125 U. S. 247, at 258 (cited with approval by *appellant* on p. 9, its Brief);

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347.

Kelley's statement that he had "heart trouble" [R. 77] was the expression of a layman's opinion, and entitled to no more weight or value, because written, than if he had given the same non-expert conclusion in person, at the trial. Though admissible (because he was dead), that and other statements of Kelley were not *conclusive.*

Nelson v. Perryman, 48 F. 2d 99, 101;

Bushey v. Hedger, 40 F. 2d 417, 418;

Royster v. Dist. Judge (1942), 128 F. 2d 197.

XVI.

Even IF Kelley's Answer to Q. 13 "a" Was Knowingly Made and Wilfully False, Such Misrepresentation Was Waived.

The expert produced by appellant as a witness on its behalf (Mr. Posey) testified that the Insurance Section of the Veterans' Administration placed the number "C 1783 255" on the face of the application [R. 58] before the application was accepted, and the jury had the right to conclude from all his testimony that it *knew* that Kelley had applied for compensation, previously, and hence it did not rely on Kelley's answer to Question 13 (a) [R. 58].

It is significant to note the admission in appellant's brief:

> "*Mere mention* of the application for compensation would have *opened the door* to an examination by the insurance officials of the Veterans' Administration of the records relating to the application for compensation and *this would have revealed* not only the diagnosis of aortitis, but also the fact that a blood test for syphilis was positive" (p. 12).

Statements in a brief may be considered as admissions of fact.

> *O'Brien, "Manual Fed. App. Proc.",* 3d Ed. (1941), p. 210, n. 10.

Appellant's own witness (Mr. Posey), produced and vouched for by it, testified that from the above-referred-to "C" number on the application, was "very likely" placed on the application before it was accepted [R. 218]; that the Insurance Section had an index of all applications for compensation, alphabetically arranged and that he was positive Kelley's "C" number was that index [R. 216]; that a "C" number is assigned to each applicant for compensation, and it was "quite probable" that a copy of the physical examination of Oct., 1931 [Ex. G, R. 109-115] was on file when it discovered Kelley's "C" number—*before* the application was approved or the policy issued. He admitted that the Insurance Section checked to see whether Kelley had had war risk term insurance *before* the application was approved, and that the presence of the "T" number on the application

["T-2015048," R. 58] just under and obviously written after the "C" number was looked up and written on the application, affirmed such fact, and that the *same* index card which shows the "T" number *also* shows the "C" number.

Testimony that the insurer would not have written the policy had it known the true facts is not conclusive as to the materiality of the misrepresentations, as a matter of law, but is only evidence to be considered by the *jury.*

> *Pac. Mutual Life Ins. Co. v. Johnson* (1934), 74 F. 2d 367.

The *Insurance* Section of the Veterans' Administration, made an investigation of its *own* records (and *not* of some other department) and *before* accepting Kelley's application, determined that he *had* applied for compensation or pension [R. 191, 214-222].

As a result, they knew:

1: That two answers by Kelley in his application were not correct: Ques. 13 (a) or 13 (d) [R. 58].

2: That Kelley had received a medical examination by the Veterans' Administration, a copy of the diagnosis being in the *Insurance Section;*

3: *If* such an examination was "consulting" a physician then it knew Kelley's answer to Q. 27 [R. 59] was incorrect.

As the Insurance Section of the appellant actually undertook to make investigations of its own, and nothing

being done by Kelley to prevent that investigation from being as full as it chose to make it, appellant cannot afterward allege that misrepresentations were made, particularly where it accepts the premiums for 6½ years [R. 54, 55] and does not hurl the charge of "fraud" until after the one person best able to meet and refute the ugly, sinister accusation has had his lips sealed forever by his death.

> *Southern Dev. Co. v. Silva* (1888), 125 U. S. 247 (cited with approval by *appellant* on p. 9, its Brief).

> "Knowledge which is sufficient to lead a prudent person to inquire about the matter (such as knowledge of facts inconsistent with statements in an application), when it could have been ascertained conveniently, constitutes notice of whatever the inquiry would have disclosed and will be regarded as knowledge of the facts."

> *Columbian etc. Ins. Co. v. Rodgers* (1940), 116 F. 2d 705; *cert. den.* 313 U. S. 561, 61 S. Ct. 838;

> *Mutual Life Ins. Co. v. Selby* (1896, *CCA-9*), 72 Fed. 980: (Where insurer knew insured had applied for a Civil War veterans' disability pension; "notice was thereby given to the insurance company that it might, on examining the pension roll, discover further particulars concerning its contents.");

> *Bowles v. Mutual Benefit Assn.* (1938), 99 F. 2d 44;

Penn-Nat'l etc. Co. v. Gen'l Fin. Corp. (1926), 16 F. 2d 36: (Where a person receives information which would indicate to any prudent person that a fraud had been committed or which is of a suspicious character, the jury has the right to infer from the circumstances, that such person actually made investigation and discovered the fraud.);

Farrar v. Policy Holders' Life Ins. Co., 3 Cal. App. 2d 87, 39 P. 2d 229; hearing denied, Calif. Supreme Ct., 1935: (The insured knew the applicant was receiving a pension for physical disability as a Spanish-American War veteran. *Held:* That it must be presumed that when the insurer, with this knowledge, issued the policy and accepted and retained the premiums, it waived the insured's misrepresentation as to his condition of health.)

It is submitted that appellant did not sustain the burden of proof as to Question 13; that under the evidence, it was not deceived, nor did it rely on the insured's answer. It made its own investigation. Knowing the facts, it issued the policy, collected and retained (and still retains—[R. 56-57]) the premiums. Its assertion of "fraud" is wholly without merit. For a more detailed statement of Mr. Posey's testimony, see I, (11); also see I, (12) and (C), Appellee's "Summary of the Evidence," this brief.

XVII.

Evidence Which Is Uncontradicted Is Not Necessarily to Be Accepted as True, nor Binding on the Jury.

Gunning v. Cooley, 281 U. S. 90, 94, 50 S. Ct. 231, 233: (cited with approval in *Wood Lbr. Co. v. Andersen* (1936, *CCA-9*), 81 F. 2d 161, *cert. den.* 297 U. S. 723, 56 S. Ct. 669, and by appellant, p. 10, its Brief);

Davis v. Coblens, 174 U. S. 719, 727, 19 S. Ct. 832, 835;

So. Pac. Co. v. Hanlon (1925, *CCA-9*), 9 F. 2d 294, 296: ("It is often a difficult question to decide when a witness is in a legal sense, uncontradicted.");

Travelers' Ins. Co. v. Price (1940), 111 F. 2d 776, 777; *cert. den.* 311 U. S. 676, 61 S. Ct. 43: ("The well-settled rule in the courts of the United States is that although the facts may be undisputed, if reasonable men might draw different conclusions from them, the case is for the *jury.*");

Elzig v. Gudwangen (1937), 91 F. 2d 434, 440;

Best v. Dist. of Columbia (1934), 291 U. S. 411, 54 S. Ct. 487, 489.

XVIII.

Weight of Expert Testimony for Jury.

The jury may exercise an independent judgment in determining how far it will follow the opinions expressed, the credibility of the expert witness and the weight to be given his testimony; and in the event of conflicting opinions, to resolve such conflicts [R. 180-181].

Pence v. U. S. (1942), ... U. S. ....., 62 S. Ct. 1080 (*Held:* credibility of doctor's testimony clearly for the jury);

Maryland Cas. Co. v. Stark (1940, *CCA-9*), 109 F. 2d 212;

U. S. v. Bemis (1939, *CCA-9*), 107 F. 2d 894: (the medical findings of the Government are not conclusive);

U. S. v. Hill (1938, *CCA-9*), 99 F. 2d 755;

U. S. v. Bodge (1936) 85 F. 2d 433;

U. S. v. Burleyson (1933, *CCA-9*), 64 F. 2d 868;

U. S. v. Francis (1933, *CCA-9*), 64 F. 2d 865, 867;

U. S. v. Alger (*CCA-9*), 68 F. 2d 592, 593;

U. S. v. Burke (1931, *CCA-9*), 50 F. 2d 653;

U. S. v. Dudley (*CCA-9*), 64 F. 2d 743;

U. S. v. Gower (1931), 50 F. 2d 370;

Barksdale v. U. S. (1931), 46 F. 2d 762: ("Medical men indulge, very generally, in theorizing on the affairs of life, while the living of life is a very practical affair.");

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665;

32 *C. J. S., "Evidence"*, Sec. 559 "a", pp. 389-394; Sec. 569 "c", p. 396; Sec. 572, p. 416 *et seq.* (citing *9th Cir.*).

And this court has stated, recently, that where medical testimony is conflicting, "we accept the interpretation which *supports* the judgment."

> *Maryland Casualty Co. v. Stark* (1940, *CCA-9*), 109 F. 2d 212 (citing 5 *C. J. S.*, pp. 425, 426, n. 31);
>
> *Fidelity & Cas. Co. v. Griner* (1930, *CCA-9*), 44 2d 706, 707.

See, also, I, (6), (8), (13), (14) and (B), Appellee's "Summary of the Evidence," this Brief.

XIX.

Kelley's Answers to Q. 27 Were Not "Fraud," Sufficient to Avoid the Policy.

As hereinbefore stated, it is difficult to glean from appellant's brief just how or in what manner the insured's answers to the complex Question 27 were "fraudulent." Does it claim that Kelley had been "ill," as "illness" is commonly understood, that the illness was of sufficient severity so that he could not have forgotten about it, and that his denial was knowingly false and made with the intention to deceive?

Then, Your Honors, *what* "illness" does appellant refer to?

Does it claim that he "contracted a disease," as "disease" is commonly known, and if so, what disease?

Does the appellant claim that he should have set forth that he had syphilis, when there is not a word of testimony that he ever *knew* he had that malady? Dr. Burstein testified that he examined Kelley; that it was a rou-

tine examination to determine entitlement to compensation or pension; that he did not advise Kelley as to the result of his findings and that he had no authority to do so [R. 116-118]. The result of the Wasserman was not disclosed to Dr. Burstein until three days *after* Kelley left the Veterans' Administration [R. 109, 113]. It was *never* disclosed to Kelley.

Does appellant rely wholly upon the statements *made by Kelley* in his applications for disability pension [R. 75-78] or compensation [R. 82-87] wherein Kelley *claimed* he had "Rheumatism, Heart trouble, trouble with spine" as the "uncontradicted testimony" that Kelley actually *had* one or more of these "diseases" in such a degree as to make his denial in his insurance application "fraud" as a matter of law? If so, which of these disorders?

Or does appellant claim Kelley's denials that he (1) ever suffered any injury, (2) been prevented by ill health from attending his usual occupation, or (3) consulted a physician in regard to his health since date of discharge were fraudulent and if so, which of these?

Appellee asks these questions advisedly; for example, appellant refers in its brief as Kelley's reference in his compensation claim to having been in "Base Hospital 48"; that was, of course, *before* Kelley's "date of discharge." Just what unspecified errors is the appellee supposed to hunt out and meet? Or is appellant raising points for the first time, on appeal?

At the outset, appellee urges, with emphasis, that as the jury, by its general verdict, determined that the Insurance Section knew the contents of the claims for compensation

and pension, and the diagnosis of Kelley's disabilities, and knew that the *Veterans' Administration doctors* believed he had aortitis and syphilis, and waived the misrepresentation (XVI, this Brief), then any question as to whether Kelley's answers were true or false becomes immaterial, and the jury's verdict, on conflicting evidence, weighed by the "law of the case" (II, this Brief), was conclusive.

Any conflicts between Kelley's statements in his insurance application [R. 58, 59] and in his claims for disability pension [R. 75-78] or compensation [R. 82-87] were not conclusive evidence of fraud; nor were his *claims* made in the pension or compensation application that he had certain disorders, conclusive against the appellee or proof that he had had any such disorders; those, like other conflicts, were not questions of law, but questions of *fact* for the determination of the *jury*.

So. Dev. Co. v. Silva (1888), 125 U. S. 247, 258, cited by appellant on p. 9, its Brief;

Berry v. U. S. (1941), 312 U. S. 450, 61 S. Ct. 637;

Jones v. U. S. (1940), 112 F. 2d 282;

Northwestern etc. Ins. Co. v. Cohn (*CCA-9*), 102 F. 2d 74;

Bailey v. U. S. (1937), 92 F. 2d 456: Where various statements made by insured cannot be reconciled with others made by him in his insurance application, it is for the jury to say which statements were true and which were false, which were innocently and which fraudulently made;

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347;

U. S. v. Jorgensen (1933, *CCA-9*), 66 F. 2d 292;

U. S. v. Francis (1933, *CCA-9*), 64 F. 2d 865;

U. S. v. Dudley (1933, *CCA-9*), 64 F. 2d 743;

U. S. v. Albano (*CCA-9*), 63 F. 2d 677, 681;

U. S. v. Tyrakowski (1931), 50 F. 2d 766, 770: "Which (statements), if any, were true, is not within our province to decide. Those matters were questions of *fact* for the trial court.";

U. S. v. Meserve (1930, *CCA-9*), 44 F. 2d 549, 552;

Hayden v. U. S. (1930, *CCA-9*), 41 F. 2d 614;

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176; *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

La Marche v. U. S. (1928, *CCA-9*), 28 F. 2d 828;

Nelson Bros. v. Perryman (1931), 48 F. 2d 99.

Strouse v. Union Indemnity Co. (1933), 67 F. 2d 528, 531:

"Although the (insured) had admitted in a prior application for other insurance that he had had a rupture, this was not conclusive. It was for the jury to determine whether the plaintiff's statement . . . was true or false."

Appellant concedes (as it must) that a representation is not fraudulent, to permit avoidance of the policy, unless made with *knowledge* of its falsity (p. 9, its Brief, and XV, this Brief). As also elsewhere noted in this Brief, the jury had a right to conclude that Kelley's answers in his application for compensation and pension were untrue, and that those in his application were true. This they might well have done, for Dr. Burnstein had seen

Kelley only once, and his testimony was not conclusive; whereas Dr. Lenker, the railroad doctor, who knew Kelley over a period of years, and who examined Kelley for the policy, found none of the ailments mentioned by Kelley in the compensation or pension applications, and from the fact that Kelley daily performed strenuous tasks, in his vocation, without loss from work. (See, please, 1, subs. 5, 6, 7, 13, 14, "Summary of Evidence," this Brief).

That Kelley lost no time from his vocation is a fact which the jury had a right to consider in determining whether or not he was in good health, in fact, and whether or not he was guilty of fraud.

Jones v. United States (1940), 12 F. 2d 282;

Northwestern Mut. Life Ins. Co. v. Wiggins (1927, *CCA-9*), 15 F. 2d 646, *cert. den.* 273 U. S. 746, 47 S. Ct. 448.

"The intent to deceive in misrepresenting past illness is a question for the *jury*." [R. 183, 184.]

Prudential Ins. Co. v. Winn (1934, *CCA-9*), 71 F. 2d 126;

Majestic Sec. Corp. v. Commissioner (1941), 120 F. 2d 12: ("Intent is a fact to be established by the party having the burden of proof.");

United States v. Robins (1941), 117 F. 2d 145;

Sentinel Life Ins. Co. v. Blackmer (1935), 77 F. 2d 347: (Misrepresentation is not "false" unless intentionally and wilfully untrue);

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665.

Conflicts in the testimony as to the condition of health of the applicant, raises a question of *fact,* to be determined by the *jury.*

Moulor v. American Life Ins. Co., 111 U. S. 335, 343, 4 S. Ct. 446, 470;

Maryland Cas. Co. v. Stark (1940, *CCA-9*), 109 F. 2d 212: (Where medical testimony is conflicting, this court said that "we accept the interpretation which supports the judgment.");

Bailey v. United States (1937), 92 F. 2d 456;

United States v. Bodge (1936), 85 F. 2d 433;

Mutual Life Ins. Co. v. Frey (1934, *CCA-9*), 71 F. 2d 259: (The insured died from chronic heart disease two months after the policy was delivered; the evidence was conflicting; held, jury question);

United States v. Tyrakowski (1931), 50 F. 2d 766, 770;

Fidelity & Cas. Co. v. Griner (1930, *CCA-9*), 44 F. 2d 706, 707: (Although the evidence offered by the losing party showed the insured had an organic disease, this Court said: "We must assume that the deceased was in perfect health," as that was an issue determined by the jury);

Security Life Ins. Co. v. Brimmer (1929), 36 F. 2d 176, *cert. den.* 281 U. S. 744, 50 S. Ct. 350;

Atlantic Life Ins. Co. v. Stringer (1928), 28 F. 2d 665;

N. Y. Life Ins. Co. v. Moats (1913, *CCA-9*), 207 Fed. 481;

Jones v. United States (1940), 112 F. 2d 282;

Northwestern Mutual v. Cohn (1939, *CCA-9*), 102 F. 2d 74;

Mutual Life Ins. Co. v. Frey (1934, *CCA-9*), 71 F. 2d 259: (This court again said, citing *Northwestern v. Wiggins*, 9 Cir., 16 F. 2d 646, that "good health," "illness" and "disease" must be considered, in an application for insurance, not in the light of scientific technical definitions, but in the light of the insured's understanding of the terms.)

Where medical testimony is conflicting this court has stated the rule to be that it should accept the interpretation which supports the judgment.

Maryland Cas. Co. v. Stark (1940, *CCA-9*), 109 F. 2d 212.

The non-disclosure of a disease which is latent, the existence of which is unknown to the applicant, will not avoid the policy or relieve the insurer of liability.

Mays v. New Amsterdam Cas. Co. (1913), 40 App. D. C. 249, *Cert. den.*, 238 U. S. 624, 35 S. Ct. 662;

Jeffress v. N. Y. Life Ins. Co. (1935), 74 F. 2d 874.

If the insurer wished to relieve itself in instances where the non-disclosure was of a disease of which the insured had no knowledge, it could so provide in the policy; and the absence of such a provision, the court would not read such a provision into its terms.

Mouler v. Amer. Life Ins. Co., 4 S. Ct. 466, 469, 111 U. S. 335;

Pilot Life Ins. Co. v. Dickinson (1938), 93 F. 2d 765, 766, 767.

Where the question, as here, was whether the insurer consulted a "physician" [R. 59, Q. 27], treatment by a chiropractor is excluded and need not be disclosed. Only a legally licensed physician or doctor of medicine was contemplated.

Jackson v. Nat'l Life, etc. Co. (1939), 90 P. 2d 1097, 150 Kan. 86 (chiropractor);

N. Y. Life Ins. Co. v. Modzelewski (1934), 255 N. W. 299, 267 Mich. 296 (chiropractor);

Le Grand v. Security Ben. Assn. (1922), 240 S. W. 852, 210 Mo. App. 700 (osteopath);

Western, etc. Ins. Co. v. Angel (1922), 134 N. E. 671, 77 Ind. App. 665;

Isaacson v. Wisconsin Cas. Assn., 203 N. W. 918;

Sec. 2409, Calif. Business and Professions Code,

Sec. 15, Act. 4811, Deering's "General Laws of Calif.," 1937 Ed.

Being examined by a physician is not "consulting a physician" and the examination of the deceased veteran by Dr. Burstein, who testified that he told the veteran nothing, and did not prescribe for him, or give him any advice, was not a "consultation" and hence the answer of the veteran was not false or a misrepresentation.

Mutual Reserve Life Ins. Co. v. Dobler (CCA-9), 137 Fed. 550.

For "consult" means to discuss something together, to ask advice; giving advice as to proper treatment to be pursued; receiving professional advice; an examination for the purposes of treatment and the term does *not* include

an examination for the purpose of securing a pension, or a routine examination [R. 116].

Halverson v. United States, 121 F. 2d 420, *cert. den.* 62 S. Ct. 412, cited by appellant p. 14, its Brief;

Atlantic Life Ins. Co. v. Stringer, 28 F. 2d 665;

Harvey v. Metropolitan Ins. Co., 62 A. 600, 602;

Winn v. Modern Woodman, 137 S. W. 272;

Union Pacific v. Graddy, 41 N. W. 809;

Scofield v. Metropolitan Ins. Co., 64 A. 1107, 1109;

Modern Woodman v. Miles, 97 N. E. 1009;

Elliot v. Grand Lodge, 95 S. W. 2d 829, 833;

Nat'l Americans v. Ritch, 180 S. W. 488, 489;

N. Y. Life Ins. Co. v. Franklin, 87 S. E. 584, 587;

Mutual Reserve v. Dobler (CCA-9), 137 Fed. 550, 556;

Farmers Ins. Co. v. Dalheim, 24 N. Y. Supp. 2d 89, 91;

No. Life Ins. Co. v. King (CCA-9), 53 F. 2d 613, *cert. den.* 285 U. S. 544, 52 S. Ct. 394;

Prudential Ins. Co. v. Winn (CCA-9), 71 F. 2d 126.

Nor was the insured "treated" by Dr. Burstein: for being "treated" implies medical treatment, including care: asking and seeking advice; and Dr. Burstein testified he gave neither [R. 116-118].

Mod. Woodmen v. Miles, 97 N. E. 1009, 1010;

Rodriques v. Life Ins. Soc., 145 S. W. 2d 1077, 1080: (where insured lost no time from work; whether "treated" by a physician, held *jury* question).

Nor is the insured required to disclose the fact of consulting a physician for slight or temporary ailments; the jury had the right to believe that if he had any ailment prior to making the application, the same came under this rule, (1) from the report of perfect health made by the medical examiner at the time the insurance was applied for; (2) the insured's uninterrupted work record; (3) the letter to him by the Veterans' Administration that his disability was less than 10%—to-wit: from 0% to 9%, surely of slight degree to the mind of the insured.

Wharton v. Aetna Life Ins. Co., 48 F. 2d 37 (citing *Mutual Reserve v. Dobler* (*CCA-9*), 137 Fed. 550, with approval);

Ocean Accident Co. v. Rubin (*CCA-9*), 73 F. 2d 157;

N. Y. Life v. Moats (*CCA-9*), 207 Fed. 481: (holding that whether answers were knowingly false, in an action by a beneficiary, is for the *jury* and motion for judgment *non obstante verdicto* was properly denied):

Mutual Life Ins. Co. v. Selby (*CCA-9*), 72 Fed. 980;

N. Y. Life Ins. Co. v. King (*CCA-9*), 53 F. 2d 613, *cert. den.* 285 U. S. 544, 52 S. Ct. 394;

Prudential Ins. Co. v. Winn (*CCA-9*), 71 F. 2d 126.

Whether an insured's statement that he had not "consulted" or been "attended" by a physician constitutes fraud is a question of fact for the *jury*.

Prudential Ins. Co. v. Winn (1934, *CCA-9*), 71 F. 2d 126: (where insured consulted three physicians, contrary to his statement, but took no treatments from them and a doctor who subsequently examined him found that his disorders were temporary and not serious).

From the letter the Government wrote Kelley [Ex. H, R. 128-129], the jury had a right to infer and conclude that Kelley understood from the letter that the only disorder which its doctors found was "aortitis" and that it was of little significance; and from the terms "mild" and "less than 25%," and from the letter's denial of his claim because his disability did not exist "to a degree of 10% or more," he had a right to assume that the disorder was 0% or 1%: and that weighed with his regularity of employment, he honestly and in good faith believed that the disorder did not constitute a "disease" or make him other than in "good health." (See I, subs. (14), (13), (10), (D), (5), (6), (H), (K), (L) and (M), appellee's "Summary of the Evidence," this Brief.)

United States v. Golden, 34 F. 2d 367, at 373:

> "The government, through its doctors, knew more about the prospect of (plaintiff's) recovery than he did. The plaintiff had a right to rely upon their statements; they were skilled in medicine, he was not.
>
> "Furthermore, the representation that he was not totally and permanently disabled, implied by his application, was induced by the representations of the government doctors. Certainly one party, whose own agents inducted the misstatement, if there was one, cannot claim estoppel against the other, who relied thereon."

If appellee's manner of handling this "point" [as to Q. 27] has not been as clear-cut as Your Honors would have desired, it is submitted that the appellant was not very helpful in specifying the particulars wherein it claimed the insured's answers to Questions 25, 26 and 27 *compelled* a verdict in its favor. The appellee-beneficiary urges that

viewing the evidence, as this Court has stated it must, with the presumptions and inferences drawn in favor of the insured, and in the light of "law of the case," the appellant did not establish legal fraud by clear, cogent, convincing and satisfactory proof, and that at the most, only conflicts were created; and as to them, the general verdict of the jury was conclusive (see, please, I, subs. "A" to "M," incl., this Brief).

XX.

There Is No Federal General Common Law.

Alameda Co. v. United States (1942, *CCA-9*), 124 F. 2d 611;

Erie R. Co. v. Tompkins, 304 U. S. 64, 78; 58 S. Ct. 817, 822; 114 A. L. R. 1487.

XXI.

Law, Between Insured and Insurer, Generally, Applies.

"When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals."

Lynch v. United States (1934), 292 U. S. 571, 54 S. Ct. 840, 843.

XXII.

Judgment Should be Affirmed for Lack of Proper Specification of Errors (Rule 20, Sub. 2, "d," Rules, CCA 9th Cir.)

The Specification of Errors relied on by the appellant [p. 2, its Brief, and R. 165-166] is that the defendant had established, as *a matter of law*, that the policy sued upon had been obtained by fraudulent representations made by the insured in his application for the policy.

Such lack of specific designation of error not only makes it impossible for the appellee to get to and answer the "vital issues," and increases the labors of this Court, but the failure to observe Rule 20, sub. 2(d) is ground for affirmance of the judgment.

Rule 20, sub. 2(d), Rules, CCA, 9th Circuit;

O'Brien, "Manual of Fed. App. Proc.," 3d Ed. (1941), pp. 209-211, and cases cited notes 5, 7, 8, 16, 17;

Humphreys Gold Corp. v. Lewis (1937, *CCA-9*), 90 F. 2d 896, 898, 899.

By reference to the "Summary of the Argument" (p. 4, its Brief), it will be noted that under paragraph "2" thereof, and also pages 15-17, appellant raises a point not included in the Specifications, and one not properly before this Court, as there has been no cross-appeal by the appellee. Under its paragraph "1," the appellant apparently relies upon a reversal, based on its claim that the uncontradicted evidence showed that the answers of the insured to Question 13 (a) [R. 58], and Question 27 [R. 59] were misrepresentations made by the insured with (1) knowledge of their falsity, and with (2) intent to deceive,

and (3) that the Government relied thereon. Just what parts of the complex Question 27 were falsely answered, appellant does not state. Neither this Court nor an appellee should be required to search for "scattered and dissipated" specifications of error. (See six opening paragraphs, "point" XIX, this Brief, for typical illustration.)

XXIII.

Conclusion.

It is conceded that there are decisions, which under a different set of facts, reach a conclusion apparently adverse to the appellee, here.

> "In reading a judicial opinion to determine the rule of law laid down, the language of the court must be read in the light of the facts before it."
>
> *United States v. Thompson* (1937, *CCA-9*), 92 F. 2d 135;
>
> *Commissioner v. W. U. Life Ins. Co.* (1932, *CCA-9*), 61 F. 2d 207;
>
> *Julian Pet. Co. v. Courtney* (1927, *CCA-9*), 22 F. 2d 360;
>
> *Tomlinson v. Coe* (1941), 123 F. 2d 65.

This court has frequently stated that in these Government insurance cases, more than any others, the facts in one case vary greatly from those in the next. It is also respectfully submitted that the Court's attention to one phase of the law may be made with considerable emphasis in one case, and not referred to in the briefs of either party, in the next. In some, the doctrines of the "law of the case" and waiver or non-reliance, were not applicable, as they are here.

That there were conflicts in the evidence, that presumptions and inferences favored the insured, that the Veterans' Administration *had* knowledge of all the facts before it issued the policy, that the jury was not *bound* by the testimony or findings of Government doctors, or even that Mr. Posey testified at all, has been evidently overlooked by the appellant.

Appellee urges that the judgment should be affirmed for want of proper or sufficient specifications of error (XXII, this Brief). And if not for that reason, then since all questions of fact were fully and fairly presented to the jury, upon instructions acceptable to the appellant, and the jury's general verdict was for appellee, and the District Judge refused to disturb the verdict, the judgment should be affirmed.

Respectfully submitted,

SYLVESTER HOFFMANN,

Attorney for Appellee.

September, 1942.